IN THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHCV2022/0174

BETWEEN:

LEMUEL ARLIINGTON FREDERICKS

Claimant

and

BYRON FREDERICK

Defendant

Before: The Hon. Mde. Justice M E Birnie Stephenson

Appearances:

Mrs. Patricia Marks Minors holding for Ronald Marks of Marks & Marks for the Claimant
Mr. Roderick Jones with Mr. Chrislon Fraser of Roderick Jones Chambers for the Defendant

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2024: September 26th

November 7th

RULING

[1]. **Stephenson J.:** Before the court is an application brought by the claimant/applicant for the appointment of an expert witness in the person of Ms. Patricia J Hale forensic document examiner. This application was filed on the **25th April 2024.**

[2]. The stated grounds for the application are:

(1). This is a matter which primarily relates to the issue of forgery and in the premise, the validity of the signature on the Will is of utmost importance;

(2). To this extent the assistance of an expert, who is an Expert Forensic Document Examiner, will help to clarify and narrow the issues in this matter.

(3). Ms Hale has been made aware of her overriding duty to the Court and to assist the court impartially on the matter relevant to her expertise and that her duty overrides any obligation to the person by whom she is instructed or paid.

(4). Ms Hale has been made aware that she is to provide independent assistance to the court by way of an objective, unbiased opinion in relation to the matter herein within her expertise.

(5). Ms Hale has been made aware that her evidence presented to the court must be and should be seen to be independent and uninfluenced.

(6). Accordingly, the aid of this Honourable Court is sought to grant the relief as prayed herein.

(7). This application is made pursuant to CPR 32.6

[3]. An affidavit was sworn in support of the application filed on the **25th April 2024** by Khalid Browne the legal clerk in the office of counsel. The affiant deponed as follows:

(1). That he is employed in the office of counsel as a legal clerk and that he was authorised by Counsel and Ms Hale to make the affidavit in support.

(2). That Ms Hale is an expert forensic document examiner in the United States of America.

(3). That he has exhibited Ms Hale's case summary and resume showing her education, training and background; also exhibited were Ms Hale's certificates, evidencing her qualifications.

(4). That Ms Hale is aware of her role, which is to provide independent assistance to the court by way of an objective, unbiased opinion which will identify the facts or assumptions upon which her opinion is based, including any material fact which could detract from her opinion.

[4]. Exhibited to the affidavit in support of the application and duly marked "KB 1" is a court case summary outlining Ms Hale's professional qualifications, including the fact that she had given evidence as a handwriting expert from February 2016 to August 2022 in various courts in the United States of America.

[5]. Exhibited and marked "KB 2" are uncertified copies of certificates in the name of Patricia J Hale showing that she has participated in the Scientific Internation Conference devoted to the study of Documents and that she has completed a two year course and apprenticeship in the field of Expert Forensic Document and Handwriting analysis.

[6]. The application came up for consideration on **Friday 27th September 2024.**

[7]. It is to be noted that counsel, on behalf of the respondent/defendant, filed submissions the **11th June 2023,** in opposition to the current application made by the claimant. These submissions were filed on an entirely voluntary basis by Counsel for the respondent/defendant in response to the application by the applicant/claimant to discontinue his original application for the appointment of the expert and accompanied simultaneously by a new and identical application to appoint the same expert; with the same error as appeared the original application; in what is perceived as an attempt to circumvent the "unless order," made by this court.

[8]. In his submissions, counsel for the respondent/defendant submitted that:

(1). The court has afforded the applicant/claimant multiple opportunities to cure the defect in his application and the applicant/claimant has failed to furnish the court with any evidence of the qualifications of the intended witness,

(2). On the **8th March 2024** the application was adjourned to the 19th April 2024 for further consideration. The applicant/claimant was also ordered to

exhibit the certificates of the proposed expert witness on or before the **5th April 2024**, failing which, the application would have been dismissed.

(3). On the **25th April 2024**, the applicant/claimant filed a notice of discontinuance of the first application to appoint the expert and simultaneously filed the second application which was identical to the first application to appoint the expert witness; supported by the same exhibit which shows no evidence of qualification.

(4). On the **26th April 2024**, the purported attempt to discontinue the application was duly struck out by the court along with the application, itself on the basis that the applicant/claimant failed to comply with the requirements of CPR 32.14 of the CPR 2000.

[9]. Counsel on behalf of the respondent/defendant submitted that considering the circumstances of the case, the following issues fall to be considered and decided by the court:

(1). Whether the court was justified in dismissing the application dated 26th July 2023 to appoint an expert witness; and the application filed on the 25th April 2024 to discontinue the application;

(2). Whether the application filed on the 25th April 2024 is an abuse of process in light of the fact that it is identical to the application which was struck out by the court on the 26th April 2024;

(3). How should the court treat with the application of the 25th April 2023?

[10]. Counsel for the respondent/defendant raised the issue of whether or not the second application is an abuse of process; where the impugned application and supporting evidence, (which offends CPR 32.14 (1)(a)), was ok refiled, without curing the defect.

[11]. Counsel submitted that in making the identical application with the identical defect, the applicant/claimant is seeking to circumvent his non-compliance with the "unless order," made by the court.

[12]. Counsel further submitted that the CPR is silent on what happens when an applicant/claimant refiles an application that has been dismissed, which is still noncompliant.

[13]. Counsel stated that the court has a duty to ensure that it protects its integrity, its inherent jurisdiction, and acts justly in all matters, in pursuit of the Overriding Objective.

[14]. It was submitted, that it cannot be in the interest of justice for the court to deliberate on a second application after the very application was dismissed for noncompliance on a prior occasion. And, if it were to do so, the court would be complicit in the abuse of its process, by the applicant/claimant.

[15]. Counsel cited and relied on the **Davidson Fergusson -v- Sarah Anita Fergusson**[1]and the decision of Master Agnes Actie. In that case the master referred to **Hunter -v- Chief Constable of the West Midlands Police (1982) AC 529** and the dicta of Lord Diplock when he described the court's power to strike:

> "*... which any court of justice must possess to prevent misuse of its procedure in a way in which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would, otherwise bring the administration of justice into disrepute amoung right-thinking people."*

[16]. Counsel also made reference to the adoption of the statement of Justice Bingham in **Johnson -v- Gore Wood**[2]when the learned judge had this to say

> *"There is an underlying public interest ... that there should be finality in litigation and that a party should not be twice vexed in the same matter.*

[1]SLUHCV2012/0387

[2] [2002] 2 A.C. 1 (14 December 2000)

The public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interest of the parties and the public as a whole." ...

[17]. Counsel further submitted that, it cannot be fair or just to any party to have the same matter that the court has pronounced on, relitigated. It was submitted that the inference to be drawn from the refiling of the identical application to appoint the expert, which was duly struck out by the court for failure to comply with the provisions of CPR is that any new application which is hinged on the identical facts; which had been finally determined before the court; is a mischief; and an abuse of the process; and should be struck out as such.

[18]. The Second application for the appointment of an expert witness was struck out by the court for the following reasons.

[19]. The high court is clothed with the jurisdiction to strike out matters that are considered to be an abuse of the court's process and matters which fail to comply with the provisions of CPR. An order to strike out an application brings an end to that application. The High Court is also clothed with the jurisdiction to make such an order on its own initiative.

[20]. In the case at bar young counsel filed an application for the second application made by the claimant to be struck out.

[21]. On the **4th of October 2024** when the new application came up for hearing, the court ordered the applicant/claimant to file submissions on or before the **18th October 2024** in response to the submissions made by the respondent/defendant and to submit on the issue as to why the court should not dismiss the second application. The applicant/claimant <u>failed and or neglected to file the submissions as ordered by the court.</u> Once again not complying with

the order of court in this matter as it pertains to the application to appoint the expert witness.

[22]. At the heart of this application lies the question of whether the applicant/claimant's second application which is identical to the first application for the appointment of the expert should be struck out as an abuse of the court's process.

[23]. The reason for this, being that the second application is the same application which is still not in compliance with the rules of CPR 2023. It is noted that the first application was struck out after that application came up a number of times and was adjourned to allow counsel to rectify the non-compliance. An "unless order," was made for the first application to be put in order, which was not done. Instead, counsel filed a notice of discontinuance to avoid compliance with the unless order and simultaneously filed a second application, with the same error.

[24]. When the matter came up for hearing in chambers, the first application and the notice of discontinuance was duly struck out.

[25]. There remains the second application for the identical relief, which, like the first application, is non-compliant with the relevant provisions of the CPR.

[26]. This court struck out the second application and promised counsel to provide written reasons for the decision to dismiss the application. The court's reasons are as follows:

[27]. The application before the court in not a mere overlooking of a deadline but is disobedience and non compliance with the court's "unless order." There has been no application by the applicant/claimant for relief from sanctions. Further, there was a blatant effort by the applicant/claimant to circumvent the

"unless order," made by the court, for the applicant/claimant to correct his noncompliance with the provisions of the CPR. The new application flies in the face of this court's clear mandate to have litigation conducted in an expeditious manner.

[28]. The application for the appointment of the expert witness has come up for this court's consideration on more than one occasion. The applicant/claimant has consistently failed to comply with the provision of the Civil Procedure Rules 2023 regarding the qualifications of the proposed expert.

[29]. This court has been more than lenient with the applicant/claimant in terms of granting adjournments for the applicant/claimant to get his house in order, so to speak, as it regards his application for the appointment of the expert witness.

[30]. To allow this application, is most probably going to cause an adjournment in the trial dates for this matter, which has already been fixed. As the expert will have to present a report, a witness statement for the witness will have to be prepared and filed; and the defendant will have to be given time to possibly respond to the evidence, all of which could have been done in a timely manner, had the applicant/claimant complied with the orders of the court. The applicant/claimant's failure to comply with the court's order cannot be regarded as trivial or not serious. There has been no explanation presented to the court for the applicant's/claimant's failure to comply with the "unless order."

[31]. In considering all the circumstances attendant to the application at bar, and in furtherance of the overriding objective of CPR 2000; and upon this court considering that the applicant/claimant has continuously failed in his duty to properly place his application before the court for the appointment of the expert; and upon the court being conscious of its duty to inculcate a culture of

compliance with court orders and the provisions of the CPR, this application is duly dismissed.

[32]. There is no order as to costs.

M E Birnie Stephenson
High Court Judge

By the Court

Registrar